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No. 87-1416

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER and ADELINE KALLEMYN, individually and on behalf of all others similarly situated,

Petitioners,

v.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, CHIEF ENGINEER OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION AND V.B. UNSELL, DISTRICT ENGINEER FOR DISTRICT 8 OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly refused to require respondents to employ sex-conscious hiring goals as a remedy in a sex discrimination case where there is no history of non-compliance and no basis for assuming that respondents would not comply with a prohibitory injunction against future discrimination.

2. Whether the court of appeals properly held that petitioners' individual Title VII claims were barred by the jury's findings under 42 U.S.C. § 1983 that none of the individual defendants had been subject to discriminatory treatment by respondents.

3. Whether the court of appeals properly held that the district court had not abused its discretion in declining to certify a state-wide class of plaintiffs when it appeared that the hiring practices at issue would vary on a district-by-district basis.

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RESPONDENTS' BRIEF IN OPPOSITION

Missouri Highway and Transportation Commission, Robert N. Hunter and V.B. Unsell (collectively "respondents") hereby oppose the petition for a writ of certiorari filed by Jane Catlett, Patricia Leembruggen, Grace Tuter and Adeline Kallemyn (collectively "petitioners") in this case.

STATEMENT

Petitioners are four females who applied for maintenance positions in District Eight of the Missouri Highway and Transportation Commission but were denied

employment. Petitioners filed a class action lawsuit against the Commission, respondent Hunter (the Commission's chief engineer), and respondent Unsell (the Commission's district engineer for District Eight) alleging sex discrimination in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*, and Section 1983, 42 U.S.C. § 1983. Pet. App. A5.[1] Respondents have previously filed a petition for a writ of certiorari in this case (No. 87-1415), in which they presented two questions concerning the legal bases upon which class-based liability was imposed by the courts below. The essential statement of the case is set out in that petition, No. 87-1415, Pet. 3-7.

1. With respect to the questions presented by petitioners herein, the relevant facts are as follows. Prior to trial the district court denied petitioners' request that a state-wide class of plaintiffs be certified. The court concluded that a district-wide class was more appropriate because each district had distinct employment practices and a trial involving all ten districts would be unmanageable. Pet. 17.

After trial the district court held that the jury's finding under Section 1983 that none of the four petitioners had been intentionally discriminated against by respondents did not preclude the court from finding for the petitioners under Title VII. Accordingly, the district court analyzed each petitioner's contention that she had been treated discriminatorily because of her sex. The court found that all four petitioners had established a prima facie case and that respondents had failed to provide a non-pretextual, legitimate "reason for the [petitioners'] treatment." Pet. App. A59. Accordingly, the district court entered judgment for each individual petitioner.

On the issue of remedy, the district court held that an injunction against further discrimination was inadequate in light of "the long history of discrimination and the

[1] "Pet. App." refers to the appendix to the petition in No. 87-1415.

comparatively short history of attempts to end such discrimination . . . ." Pet. App. A69. Specifically, the court imposed a goal "to fill 37%—48% new vacancies for maintenance jobs in District 8 with women." *Id.* at A70. To monitor respondents' compliance with these affirmative action requirements, the district court retained jurisdiction until 1990 and required respondents to report their progress toward meeting that goal.

2. The court of appeals affirmed the district court's class certification order, reversed the entry of judgment in favor of the petitioners, as individual claimants under Title VII, and vacated the affirmative action portions of the district court's remedial order. Pet. App. A24, A7-A9, A16-A18. With respect to the district-wide class that was certified, the court of appeals' entire discussion was as follows (Pet. App. A24; citations omitted):

> On cross-appeal we review the district court's class certification ruling for abuse of discretion . . . and we find no abuse in the denial of a statewide class here.

On the issue of the individual petitioners' Title VII claims, the court of appeals held that the jury's finding that petitioners were not discriminated against under Section 1983 estopped petitioners from recovering for disparate treatment under Title VII. The court of appeals rejected petitioners' assertion that the district court had found for them on a theory of "unintentional" discrimination that did not conflict with the jury's verdict. The court of appeals stated that "[a]s we understand the district court's opinion, . . . the court drew a specific legal conclusion of disparate impact only with regard to Missouri's reliance on word-of-mouth recruiting . . . ." Pet. App. A7. Because "the individual plaintiffs all applied for maintenance positions, "they were not victims of this discriminatory practice [in recruiting applicants]." *Id.* at A7-A8. Accordingly, the court of appeals concluded that the only potential ground on which petitioners

could recover—disparate treatment—was barred by the jury's verdict under Section 1983.

Finally, with respect to the entry of affirmative hiring goals as a remedy, the court of appeals held that the relief was excessive. The court held that there was no basis for accusing Missouri of " 'foot-dragging resistance' to court orders" and therefore no reason to presume that a prohibitory injunction would be a futile gesture at eradicating discrimination. Pet. App. A17, quoting *Local 28 of the Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 106 S.Ct. 3019, 3051 (1986). The court of appeals expressly declined to go beyond this Court's prior decisions and approve "a court-ordered race- or gender-conscious remedy against a defendant which has not been given a chance voluntarily to bring its personnel practices into compliance with a generalized injunction . . . ." Pet. App. A17. Because the court vacated the affirmative relief, it also vacated the district court's order retaining jurisdiction over the case and the reporting requirements designed to implement the hiring goals. *Id.* at A17-A18. The court of appeals, however, ordered respondents to retain all relevant hiring records and admonished respondents to publicize employment opportunities for women and to demonstrate their commitment to hiring women in maintenance positions. *Id.* at A18.[2]

DISCUSSION

Petitioners have presented three questions that plainly do not warrant review by this Court. With respect to the affirmative action ruling, the court of appeals was completely faithful to this Court's rulings on the propriety of race- or sex-conscious affirmative relief. In addition, the court's decision does not conflict with the de-

[2] The court of appeals also reminded respondents that the 37-48 percent range for potential women hires might "prove a useful standard for Missouri in evaluating its own compliance with our injunction." Pet. App. A18.

cision of any other court of appeals and is, in any event, correct. The estoppel and class certification issues involve matters that affect only the parties to this litigation. The estoppel issue turns solely on the proper interpretation of the district court's opinion and the certification issue involves the application of the settled "abuse of discretion" standard to the facts of this case. Moreover, the court of appeals correctly decided both of those issues.

1. Petitioners argue (Pet. 8-14) that the court below erred in vacating the hiring goal imposed by the district court.[3] They mischaracterize the holding as requiring a showing of contempt before affirmative relief can be granted.

Petitioners' analysis is flawed both in its analysis of the holding below and in its criticism of that holding. First, nothing in the court's opinion requires a finding of contempt as a predicate for imposing an affirmative action remedy. The reasoning of the court of appeals comports fully with the pivotal concurrence of Justice Powell in *United States* v. *Paradise*, 107 S.Ct. 1053, 1074 (1987). In *Paradise*, Justice Powell indicated that a finding of contempt is irrelevant and that the predicate for a race- or sex-based remedy is any kind of persistent violation of rights or repeated failure to carry out court orders. Nothing approaching these conditions is present in this case.

Second, petitioners completely ignore the statement in Justice Brennan's plurality opinion in *Sheet Metal Workers'* that "[i]n most cases, the court need only order the employer . . . to cease engaging in discriminatory practices, and award make-whole relief" to the victims of

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[3] Petitioners also complain separately about the decision to set aside the reporting requirements. But those requirements were imposed by the district court to monitor compliance with the affirmative action obligations. Without these obligations, there is no independent reason to require that respondents automatically provide additional information to the district court.

discrimination. 106 S.Ct. 3019, 3036 (1986). See *id.* at 3054 (Powell, J., concurring) ("an injunction alone is insufficient" only "in cases involving particularly egregious conduct").

The district court did not find that respondents had engaged in any "egregious" conduct. Instead, it merely observed that discrimination by public employers is "distressing and demeaning," Pet. 10, quoting Pet. App. A62.[4] But this Court has never suggested that the standard for imposing race- or sex-conscious relief is different for public as opposed to private employers. There is simply no reason to assume that the Commission will not comply with the district court's injunction. Indeed, the number of female hires in maintenance positions in recent years is strong evidence that respondents are committed to ensuring that there is no future discrimination in hiring.[5]

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[4] Petitioners' statement that "this case involves egregious, longstanding and persistent discrimination" (Pet. 10) is belied by the extraordinary legal reasoning that was required to hold respondents liable at all under Title VII. As we indicated in our petition in No. 87-1415, the courts below imposed liability by denying respondents the benefit of a bottom line defense and by rejecting respondents' use of refined labor pool statistics which showed there had been no discrimination. Given the slender basis for the holding on liability, there is no basis for petitioners' claim that this case justifies an extreme remedy such as the one imposed by the district court. In any event, there is no reason to review the court of appeals' fact-bound resolution of this issue.

[5] As respondents explained in their petition in No. 87-1415, this is not a case where an employer has maintained "clogged channels of opportunity." *Hammon* v. *Barry*, 826 F.2d 73, 78, *reh'g granted, in part, en banc*, 833 F.2d 367 (D.C. Cir. 1987). Eight women had been hired for maintenance positions by respondents even before any judgment was entered. Moreover, it is undisputed that based upon applicant flow data, women had a slightly better chance of being hired than men (2.6 percent compared to 2.5 percent). No. 87-1415, Pet. at 5. Accordingly, this is not a situation that required the kind of extraordinary race- or sex-conscious remedy this Court opposed in *Sheet Metal Workers'* and *Paradise*.

In sum, this Court's decisions indicate that in a garden variety case involving a finding of discrimination, a simple injunction should be the first remedial step. The court of appeals followed that approach in this case and petitioners have cited no case where a court of appeals has required a more intrusive remedy solely on the basis of a finding of liability. The issue presented does not warrant review by this Court.

2. Petitioners argue (Pet. 14-17) that the court of appeals erred in holding that the four individual Title VII claims were barred by the jury's finding that the individual plaintiffs had not been discriminated against. Because that issue is inherently fact bound, petitioners attempt to cast it in terms of whether a disparate impact analysis can ever apply to a subjective hiring process. See *Watson* v. *Fort Worth Bank & Trust*, No. 86-6139. But the court of appeals made no holding on that issue. Instead, it held that a neutral criterion, such as word-of-mouth recruiting, which had a disparate impact only on the class of *potential* women applicants was irrelevant to the individual plaintiffs here because they all had applied for employment. In other words, any disparate impact arising from respondents' recruiting techniques could not, by definition, have affected persons who actually applied. Thus, this Court's disposition of *Watson* can have no possible bearing on the validity of the holding below in this case.[6]

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[6] Petitioners also quarrel with the court of appeals' reading of the district court's opinion. They assert that word-of-mouth hiring was not the only basis for the disparate impact holding. Petitioners claim that "the Court of Appeals missed the [district] court's *findings* regarding the 'unregulated hiring process.'" (Pet. 15, emphasis added). During trial, petitioners did not introduce any evidence or statistical analysis even purporting to focus on any component of the post-application selection process. Thus, the district court was required by the evidence to assess the post-application process under a disparate treatment analysis. Pet. App. A57. Accordingly, the court of appeals did not ignore the district court's

3. Finally, petitioners challenge (Pet. 17-19) the refusal of the courts below to certify the plaintiff class on a state-wide basis. They argue that the district court's findings in its liability opinion indicate that employment policy was set at the state level, not the district level, and thus there were common issues of law and fact at the state level. Also, petitioners assert that the district court's finding of unmanageability was not adequately explained. This issue plainly does not warrant review by this Court.

First, the court of appeals' legal analysis of the proper standard of review of the district court's certification decision is unquestionably correct. Petitioners certainly do not suggest that the court of appeals erred in applying an abuse of discretion standard. Second, the district court committed no error in recognizing that each hiring unit's employment practices would raise unique issues. Nor is this finding undermined by the mere existence of state-wide employment policies and state level review of hiring recommendations. As the district court ultimately found, the actual hiring process was not flawed. Female applicants had a better chance of being hired than male applicants (see n.5, *supra*). Thus, the employment policies at the state level were not a significant issue in this case. Instead, the issues turned on how the individual district implemented recruiting policy. Accordingly, the district court committed no error in declining to expand the class significantly in order to keep the case within manageable limits.

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findings of fact; instead, it held that the district court had reached a specific *legal conclusion* of disparate impact only with respect to word-of-mouth recruiting. Pet. App. A7. The court's holding that that legal conclusion was irrelevant to petitioners' individual claims is clearly correct and in any event does not warrant further review.

CONCLUSION

The petition for a writ of certiorari in No. 87-1416 should be denied.

Respectfully submitted,

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